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No. 06-1184

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SPRINT NEXTEL CORPORATION &
T-MOBILE USA, INC.,

Petitioners,

v.

NATIONAL ASSOCIATION OF STATE UTILITY
CONSUMER ADVOCATES, ET AL.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Section 332(c)(3)(A) of the Communications Act, 47 U.S.C. § 332(c)(3)(A), generally prohibits States from regulating the "rates charged by" wireless carriers but expressly preserves States' authority to regulate "other terms and conditions" of wireless service. The Federal Communications Commission declared that any State law requiring or prohibiting wireless carriers' use of line items on customer bills is expressly preempted by Section 332(c)(3)(A). The Eleventh Circuit vacated the FCC's ruling, concluding that Congress unambiguously preserved States' authority to regulate the use of line item charges in wireless bills. The questions presented for review are:

1. Whether the Eleventh Circuit correctly held, under Step One of the analysis set forth in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), that the FCC erred in ruling that state and local laws prohibiting line item charges on wireless bills were preempted under Section 332(c)(3)(A).

2. Whether the Eleventh Circuit erred by applying the presumption against preemption to guide its analysis of Section 332(c)(3)(A) under *Chevron* Step One.

RULE 29.6 STATEMENT

The National Association of State Utility Consumer Advocates and the National Association of Regulatory Utility Commissioners are incorporated associations, neither of which is publicly traded, whose members include State governmental agencies concerned with the regulation of public utilities.

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INTRODUCTION

Petitioners present no grounds warranting review by the Court of the Eleventh Circuit's decision vacating the Federal Communications Commission's ("FCC") Declaratory Ruling that Section 332(c)(3)(A) of the Communications Act of 1934 ("Act")[1] prohibits state regulation of wireless carriers' line item charges. Indeed, the petition must be sifted carefully to find a statement of the grounds supporting review in this case. Contrary to Petitioners' assertions, the Eleventh Circuit's decision does not present any real or direct conflict with other decisions of the Circuit Courts of Appeals or this Court with respect to either its analysis under *Chevron* Step One or its reference to the presumption against preemption as guidance in performing that analysis.

Rather than demonstrating a real and intolerable conflict among the Circuits, or a conflict with this Court's prior rulings, the petition for review is based on Petitioners' claim that the Eleventh Circuit erred in vacating the FCC's Declaratory Ruling. This is not a sufficient basis for review. Recognizing this defect in their argument, Petitioners seek to elevate the importance of the Eleventh Circuit's decision by mischaracterizing its impact, both on wireless consumers and on the statutory scheme for regulating wireless telecommunications. The Eleventh Circuit's ruling, however, does not present any issues of pressing national importance. *First*, Petitioners overstate the effect of the Eleventh Circuit's ruling on wireless carriers and consumers while ignoring legitimate State interests served by the laws in question. *Second*, Petitioners exaggerate the impact of the court's ruling on the federal-state wireless regulatory scheme by mischaracterizing Congress' 1993 amendments to the Act and by wrongly suggesting that preemption may be implied to achieve those purposes.

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[1] 47 U.S.C. §§ 151 *et seq.*

Finally, the Eleventh Circuit's decision was correct on the merits. The court properly based its decision on the two-step analysis established by the Court in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). Under *Chevron* Step One, the 11th Circuit independently reviewed Section 332(c)(3)(A) of the Act to determine whether Congress unambiguously spoke to the precise question addressed by the FCC, *i.e.*, whether Section 332(c)(3)(A) preempted or preserved the State laws in question. Likewise, the Eleventh Circuit employed traditional tools of statutory construction in determining that wireless line item charges are not "rates charged by" wireless carriers but rather are billing practices that fall within the scope of "other terms and conditions" of wireless service that States continue to regulate under Section 332(c)(3)(A).

STATEMENT OF THE CASE

A. LEGAL AND REGULATORY BACKGROUND.

1. Regulatory Treatment of Wireless Communications Service.

Communications services have historically been subject to regulation by both States and the Federal government. *See Verizon Communications Inc. v. FCC*, 535 U.S. 467, 477-78 (2002); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986) (discussing history of telecommunications regulation in the United States). As this Court has noted, "[i]n broad terms, the [Act] grants to the FCC the authority to regulate 'interstate and foreign commerce in wire and radio communication,' 47 U.S.C. § 151, while expressly denying that agency 'jurisdiction with respect to . . . intrastate communication service . . . .' 47 U.S.C. § 152(b)." *Louisiana PSC*, 476 U.S. at 360; *see* Resp. App. 3-5a. Although Congress amended the Act during the 1990's in order to encourage competition, "[n]either Congress nor the [FCC], however, totally abandoned traditional regulatory requirements [and] . . . the amendments left many

traditional requirements and related statutory provisions . . . in place." *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, No. 05-705, slip op. at 4 (April 17, 2007). Wireless communications are subject to this dual federal-state regulatory regime, although this regime too was revised by Congress in 1993.

Prior to 1993, land mobile radio services (as wireless was then called) were subject to two inconsistent regulatory schemes based on whether the services were characterized as "public" or "private." "Public mobile services" were subject to regulation as common carriers and were thus subject to all federal and state regulations applicable to such entities. The FCC regulated the interstate aspects of such services and States regulated their intrastate aspects, including certification, rates and other terms and conditions of service.[2] "Private land mobile services," *i.e.*, radio services that did not connect with the public telephone network except by direct agreement with a local carrier, however, were exempt from common carrier regulation altogether. *See, generally,* P. Huber, M. Kellogg, & J. Thorne, *Federal Telecommunications Law*, § 10.2, p. 867 (2d ed. 1999).

In 1993, Congress altered this regulatory framework by amending the Act in several respects, including amending Section 332(c)(3)(A). *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, 107 Stat. 312, § 6002(b)(2)(A) (1993). As amended, section 332(c)(3)(A) provides in pertinent part:

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[2] *See, e.g., Alabama Cellular Serv. v. Sizemore,* 565 So.2d 199 (Ala. 1990); *Re Cellular Alaska P'ship*, 111 P.U.R.4th 303 (Alas. P.U.C. 1989); *Cellular Plus v. Superior Court,* 18 Cal. Rptr.2d 308 (Cal. Ct. App. 1993); *Wolf v. Dept. of Pub. Util.*, 553 N.E.2d 922 (Mass. 1990); *Cellular Tel. Co. v. Rosenberg*, 581 N.Y.S.2d 554 (N.Y. Sup. Ct. 1992); *State ex rel. Util. Comm'n v. Centel Cellular Co.*, 407 S.E.2d 257 (N.C. Ct. App. 1991); *Williams v. Public Serv. Comm'n*, 720 P.2d 773 (Utah 1986); *Bell Atlantic Mobile Systems of West Virginia, Inc.*, Case No. 91-864-C-CN, Commission Order Granting Certificate (W. Va. P.S.C. 1992).

> Notwithstanding sections 2(b) and 221(b) [47 USCS § 152(b) and § 221(b)], no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. . . . Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that –
>
> (i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or
>
> (ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

47 U.S.C. § 332(c)(3)(A).[3]

Congress stated that the amendments were intended "to provide that services that provide equivalent mobile services are regulated in the same manner...." H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. (1993) *reprinted in* 1993 U.S.C.C.A.N. 378, 586. Congress made it clear that the primary purpose of the 1993 amendments was to eliminate

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[3] As originally enacted, Section 332(c)(3) provided that "no State or local government shall have any authority to impose any rate or entry regulation upon any private land mobile service, except that nothing in this subsection may be construed to impair such jurisdiction with respect to common carrier stations in the mobile service." *See* Pub. L. No. 97-259, 96 Stat. 1087, 1096, § 120(a) (1982).

the disparate regulatory treatment of "private mobile" and "public mobile" wireless services, in order both to promote the deployment of wireless service nationwide while at the same time protecting wireless consumers:

> The Committee finds that *the disparities in the current regulatory scheme could impede the continued growth and development of commercial mobile services and deny consumers the protections they need if new services such as PCS were classified as private. ... To foster the growth and development of mobile services* that, by their nature, operate without regard to state lines *as an integral part of the national telecommunications infrastructure, new section 332(c)(3)(A) also would preempt state rate and entry regulation of all commercial mobile services.* States may petition the FCC for authority to re-regulate the rates for commercial mobile services under specified circumstances.

1993 U.S.C.C.A.N at 587 (emphasis added).

Congress' goal was not, as Petitioners suggest, to create a uniform, national deregulatory framework for commercial wireless carriers (Pet. 10), or to "eliminate the traditional limitation on federal authority over intrastate . . . wireless service" (*id.* at 18) or to promote nationwide or regional pricing schemes (*id.* at 5). Under the revised regulatory framework, State regulation of commercial mobile radio service ("CMRS," as wireless service is also known) – that is, State regulation of "other "terms and conditions of" wireless service and, under some circumstances wireless "rates," was expressly recognized and preserved. Moreover, Congress made it clear that States' authority over "other terms and conditions" of such service was to be broadly construed:

> *It is the intent of the Committee that the states still would be able to regulate the terms and conditions of these services. By "terms and conditions," the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters*; facilities siting issues (e.g., zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis *or such other matters as fall within a states lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions."*

1993 U.S.C.C.A.N. at 588 (emphasis added).

2. Complaints Regarding Carrier Line Items And Other Billing Practices Prompted Regulation.

Carrier billing practices – and in particular carrier line item charges – have been the subject of numerous consumer complaints and the focus of regulation by both the FCC and States in response. For its part, the FCC adopted "Truth-in-Billing" principles and rules governing carrier billing practices in 1999 to address, among other things, the "dramatic growth" in fraudulent "slamming" and "cramming"[4] activities and the "substantial rise" in consumer complaints regarding billed charges. *In re Truth-in-Billing*

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[4] "Slamming" occurs when a company changes a subscriber's carrier selection without that subscriber's knowledge or explicit authorization; "cramming" refers to the practice of causing unauthorized, misleading, or deceptive charges to be placed on consumers' telephone bills. *See In re Truth-in-Billing & Billing Format*, Order on Reconsideration, 15 F.C.C.R. 6023 ¶1 n.2 (2000). Issues concerning carriers' use of line item charges would generally fall under the rubric of "cramming."

and Billing Format, First Report and Order and Notice of Further Proposed Rulemaking, 14 F.C.C.R. 7492, 7494-95 ¶3 (1999). The FCC made it clear that the broad principles it adopted to promote truth-in-billing applied to all telecommunications carriers, wireline and wireless. *Id.* at 7501 ¶13. In addition, while the FCC declined to apply most of its Truth-in-Billing rules to wireless carriers, it "require[d] CMRS carriers to comply with standardized labels for charges resulting from Federal regulatory action," *i.e.*, line items, once such requirements had been adopted. *Id.* at 7502 ¶18. The FCC also issued a further notice of proposed rulemaking, seeking comment whether CMRS carriers should be made subject to the remainder of its rules. *Id.* at 7535 ¶68. Finally, the FCC specifically stated that its Truth-in-Billing principles and rules were not intended to preempt state laws regulating carrier billing practices:

> [S]tates will be free to continue to enact and enforce additional regulation consistent with the general guidelines and principles set forth in this Order, including rules that are more specific than the general guidelines we adopt today. In addition to whatever powers they may have to enforce their rules under state law, states also have express authority under section 258 to enforce the Commission's verification procedure rules, including the principles and guidelines adopted here, with respect to intrastate services.

14 F.C.C.R. at 7507 ¶26.

B. PROCEEDINGS BELOW.

1. The FCC's Declaratory Ruling.

The FCC's 1999 Truth-in-Billing order failed to stem the tide of misleading and confusing carrier billing practices. More and more carriers – wireline and wireless alike – included more and more line item charges on customers' monthly phone bills, many of them misleadingly vague, ambiguous or suggesting the government rather than the carrier was responsible for the charge. After five years of FCC inaction, the National Association of State Utility Consumer Advocates ("NASUCA") petitioned the FCC to issue a declaratory ruling to rein in such billing practices. NASUCA alleged that carriers' so-called "regulatory" line item charges violated the FCC's Truth-in-Billing orders and should be prohibited unless mandated or authorized by federal, state or local governments. *See In re Truth-in-Billing and Billing Format*, NASUCA Petition, CC Docket No. 98-170 (March 30, 2004) (available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516085825); *see also id.*, NASUCA Reply Comments, CG Docket No. 04-208 (Aug. 13, 2004) (available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516287652).

The FCC sought public comment regarding NASUCA's petition. *See* 69 Fed. Reg. 33021 (June 14, 2004); *see also In re Truth-in-Billing & Billing Format*, Public Notice, 19 F.C.C.R. 9541 (2004). Numerous comments were filed by carriers, state regulators, consumer advocates and also by thousands of individual consumers. *See* Pet. App. 126-28a. In response to the evidence in the record indicating widespread customer complaints and confusion regarding wireless carriers' line item charges, the FCC eliminated some of the exemptions from its Truth-in-Billing rules for wireless carriers. Pet. App. 52-53a. In addition, the FCC initiated a further rulemaking proceeding to

consider adopting more stringent Truth-in-Billing rules for all carriers. *Id.* at 76-87a. Nonetheless, the FCC rejected NASUCA's petition. *Id.* at 58-59a.

Yet despite the fact that neither NASUCA's petition nor the FCC's public notices suggested preemption of state regulation was an issue, the FCC further declared that "state regulations requiring or prohibiting the use of [wireless] line items – defined here to mean a discrete charge identified separately on an end user's bill – constitute rate regulation and, as such, are preempted under [47 U.S.C. §332(c)(3)(A)]." Pet. App. 65-68a. In addition, the FCC sought comment in its further rulemaking regarding its tentative conclusion that it should preempt entirely state regulation of carriers' billing practices on the theory that "clearly discernible federal objectives . . . may be undermined by states' "non-rate" regulation of CMRS carriers' billing practices," and seeking comment regarding the "degree [to which] such 'conflict preemption' [can] be applied to *all* carriers under the provisions of the Act and other policy frameworks." *Id.* at 88-90a. (emphasis original). Both the Declaratory Ruling and Second Further Notice of Proposed Rulemaking portions of the FCC's order provoked strong dissents by two of the FCC's Commissioners. *See* Pet. App. 134-37a (Separate Statement of Commissioner Copps); *id.* at 138-40a (Separate Statement of Commissioner Adelstein).

2. The Eleventh Circuit's Decision.

NASUCA sought review of the Declaratory Ruling in the United States Court of Appeals for the Eleventh Circuit, pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). The Vermont Public Service Board ("Vermont") filed a separate petition for review of the Declaratory Ruling in the United States Court of Appeals for the Second Circuit. Pursuant to 28 U.S.C. § 2112(a)(3), the Judicial Panel on Multidistrict Litigation ordered the two appeals consolidated in the Eleventh Circuit. The National Association of Regulatory Utility Commissioners ("NARUC") subsequently intervened

in support of Vermont's appeal. Petitioners, several other wireless carriers and the wireless industry's trade association intervened in support of the FCC's preemption ruling.

In a unanimous decision, the Eleventh Circuit granted the petitions for review and vacated the FCC's Declaratory Ruling.[5] The Eleventh Circuit first noted that "[a]lthough the presumption against preemption cannot trump our review of the [FCC] Order under *Chevron*, this presumption guides our understanding of the statutory language that preserves the power of the States to regulate 'other terms and conditions.'" Pet. App. 23a. The court then concluded that the "language of section 332(c)(3)(A) unambiguously preserved the ability of the States to regulate the use of line items in cellular wireless bills." *Id.* at 25a. In reaching this conclusion, the court relied on "[a] straightforward reading of the complementary phrases 'regulate entry of or the rates charged' and 'other terms and conditions,'" in Section 332(c)(3)(A) which "evidence[] the 'clear and manifest purpose of Congress' to leave the regulation of line items to the states." *Id.* (internal citation omitted). This is so, the court declared, because "[t]he prohibition or requirement of a line item affects the presentation of the charge on the user's bill, but it does not affect the amount that a user is charged for service. . . ." *Id.* at 26a. "Because the presentation of line items on a bill is not a 'charge or payment' for service," the court concluded, "it is an 'other term or condition' regulable by the states." *Id.* (internal citations omitted).

On petitions for panel rehearing filed by the FCC and the wireless intervenors, the court modified the final sentence of its order to clarify that the preemption determination in the Declaratory Ruling was vacated and remanded to the FCC, but in all other respects denied the petitions for rehearing. Pet. App. 36-37a. The Eleventh Circuit subsequently denied

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[5] The Eleventh Circuit also granted motions to dismiss Vermont's appeal but permitted NARUC to proceed as an intervenor in that appeal. Pet. App. 18a.

the wireless intervenors' petition for rehearing *en banc*. *Id.* at 34-35a. Petitioners then filed a motion for stay of the court's mandate, which the Eleventh Circuit also denied. *See* Resp. App. 1-2a.

Petitioners filed the instant petition for certiorari on February 27, 2007. The Solicitor General declined to file a petition with this Court seeking review on behalf of the FCC, declined to file a respondent's brief on the FCC's behalf in support of Petitioners pursuant to Sup. Ct. R. 12(6), and filed a waiver of the FCC's right to file a brief on March 28, 2007. Likewise, none of the other wireless intervenors below filed briefs supporting the instant petition. NASUCA and NARUC respectfully submit this Opposition.

REASONS FOR DENYING REVIEW

The Court grants certiorari "only for compelling reasons." Sup. Ct. R. 10. The instant petition provides none. It is clear from both the questions presented by Petitioners ("[w]hether the Eleventh Circuit erred . . . ") and their argument ("[t]he Eleventh Circuit's decision is rife with error"), that Petitioners seek certiorari based on the notion that the Eleventh Circuit's decision was erroneous, rather than on any direct conflict between that decision and decisions rendered by other appellate courts or this Court. It is generally understood, however, that the Court "is not, and never has been, primarily concerned with the correction of errors in lower court decisions," and that the Court "must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved." Address of Chief Justice Vinson before American Bar Association, 69 S.Ct. v-vi (Sept. 7, 1949); *see also Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974). Petitioners fail to show that the Eleventh Circuit has decided an important question of federal law that has not been, but should be, settled by this Court. Finally, Petitioners' assertion that the Eleventh Circuit erred is simply wrong.

I. REVIEW OF THE ELEVENTH CIRCUIT'S HOLDING THAT THE FCC'S PREEMPTION RULING FAILS UNDER *CHEVRON* STEP ONE IS NOT WARRANTED.

A. THE ELEVENTH CIRCUIT'S ANALYSIS OF SECTION 332(C)(3)(A) UNDER *CHEVRON* DOES NOT PRESENT A CONFLICT WARRANTING REVIEW.

One of the primary purposes of the Court's certiorari jurisdiction is to address appellate court decisions that are in direct conflict with a decision of another federal appeals court on the same, important matter of federal law. *See* Sup. Ct. R. 10(a). Petitioners fail to set forth any basis for review of the Eleventh Circuit's determination, under *Chevron* Step One, that Section 332(c)(3)(A) unambiguously does not preempt state laws requiring or prohibiting wireless carriers' use of line items. No conflict between the Circuits in the Eleventh Circuit's application of *Chevron* Step One is alleged by Petitioners. This is unsurprising since the FCC itself noted that it had not previously addressed this question. Pet. App. 70-71a n.90 ("The Commission never has considered, however, where among section 332(c)(3)(A)'s key terms state regulation prohibiting or requiring line items should fall. *We address this issue for the first time in this item . . . .*").[6] Nor do Petitioners allege any conflict between the Eleventh Circuit's application of *Chevron* and this Court's decisions implementing that analysis.

Petitioners cite two district court decisions in the Ninth Circuit that deferred to the Declaratory Ruling, after its vacatur, and suggest those decisions may lead to a conflict in the Circuits. Pet. 17; *see Peck v. Cingular Wireless*, No. 06-30267 (9th Cir., appeal pending). Generally, however, differing decisions between district courts in one circuit and

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[6] Petitioners likewise fail to identify any conflict between the Eleventh Circuit's analysis of the FCC's preemption ruling under *Chevron* Step One, and decisions of this Court.

the appellate court in another circuit do not present the sort of conflict this Court reviews. Moreover, Petitioners concede that any conflict in the Circuits is hypothetical and that a conflict may very well fail to materialize.[7]

B. THE ISSUE DECIDED BY THE ELEVENTH CIRCUIT IS NOT OF PRESSING NATIONAL IMPORTANCE.

In the absence of any conflict warranting review, Petitioners invite the Court to grant their petition solely to review the merits of the Eleventh Circuit's decision by overstating the importance of the court's ruling. First, Petitioners exaggerate the alleged harms of State laws regulating the presentation of line items on wireless bills. Next, Petitioners wrongly suggest the Eleventh Circuit's decision altered the regulatory scheme governing States' authority over wireless service, when in fact it was the FCC's ruling that upset the federal-state regulatory balance.

1. Petitioners Overstate The Impact Of The Eleventh Circuit's Ruling.

Petitioners overstate the impact of the Eleventh Circuit's ruling by exaggerating the possible harm from States being able to prohibit, or for that matter require, inclusion of line items on wireless bills. Pet. 16-17.[8] For example,

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[7] Although appellants in *Peck* assert that the district court's deference to the vacated FCC's ruling was improper, they also cite numerous other grounds for reversal of the district court's decision, including state law-based arguments. As Petitioners concede, no conflict arises if the Ninth Circuit reverses the district court's decision to defer to a previously-vacated FCC order. Likewise, if the Ninth Circuit reverses the district court on those other grounds, no conflict arises.

[8] It is ironic that Petitioners couch their argument as an attempt to protect consumers since the FCC's Truth-in-Billing orders cited extensive consumer confusion and complaints regarding carrier line item charges, to which the agency inappropriately responded by eliminating States' ability to redress such billing practices. *See* Pet. App. 52-53a, 78a; *see also, e.g.*, 14 F.C.C.R. at 7494-96 ¶¶3-4. Petitioners' standing to seek review based on alleged harms to their customers seems dubious in any case.

Petitioners claim that the Eleventh Circuit's decision "will encourage state and local governments to adopt and hide taxes on wireless service . . . obstruct[ing] wireless carriers' ability to offer national rate plans." Pet. 2, 10. Petitioners also claim that "States and localities . . . have recently taken steps to hide those taxes and fees [they impose on wireless service] from consumers by prohibiting wireless carriers from using line items to collect them." *Id.* at 2, 4. There is no merit to Petitioners' claims.

First, Petitioners overlook the breadth of the FCC's ruling, which preempted any State laws requiring or prohibiting line items, including State or local taxes or regulatory fees. Petitioners also ignore the fact that States have legitimate purposes in enacting laws prohibiting or requiring line items by utilities, including wireless carriers, and other businesses. States often mandate line items for sales taxes, for example, to ensure orderly administration of the tax. A receipt that itemizes a sales tax is an efficient means to protect taxpayers from double liability for the tax and also assures exempt taxpayers, such as churches, that they have been properly excluded from the tax. States likewise have legitimate reasons for prohibiting certain line item charges, such as utility gross receipts taxes, including avoiding confusion about the taxable entity. For example, customers who receive a bill with a line item identified as a state gross revenue tax and who call the state tax department regarding the tax or amount charged may be advised only that the line item charge is not authorized by state law. Similarly, State officials may find it difficult to explain to a customer why the line item rate on the bill is higher than the utility's assessment.[9] Moreover, experience shows that the inherent

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[9] For example, to recover its cost from paying a gross revenue tax with a rate of R, the carrier would need to add a surcharge to the customer's bill equal to (R / (1-R). Thus, if the carrier paid a rate of 10% on its gross revenue, it would need to charge 11.1% to recover its payment.

complexity in recovering a gross revenues tax can, and historically has, produced overcharges.[10]

Petitioners also overstate the impact of State taxes on their national pricing plans. For one thing, it is unclear why Petitioners single out gross revenue taxes as a particular threat to wireless carriers' national pricing plans. National carriers' costs to provide service vary by state, and many of those costs, such as corporate income and property taxes, prevailing wages or real estate values, are likely to have a greater impact on wireless carriers' ability to offer national pricing plans than the relatively minor cost imposed by State gross revenue taxes. In addition, Petitioners fail to explain how their State-specific line item charges will relate to nationally-advertised service rates if the Eleventh Circuit is reversed. While Petitioners suggest consumers benefit from wireless carriers' ability to advertise one national rate, the national pricing they advocate is illusory. In practice, the amount consumers are billed is anything but nationally uniform since wireless carriers add unadvertised State-specific line item charges to consumers' bills. In other words, Petitioners claim national policy favors nationally-uniform pricing but jettison that notion in order to impose State-specific charges.

Second, Petitioners' angst over "hidden" State or local taxes is overblown. Petitioners ignore the fact that the Eleventh Circuit's decision does not prevent carriers from communicating with customers regarding State fees and taxes. The court's ruling does not interfere with carriers' recognized ability to provide customers with information or opinions regarding State and local taxes through non-

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[10] States' concerns that carriers may use line items to mislead consumers or over-recover taxes and fees are well-founded. *See, e.g., In re State of Texas v. Sprint Spectrum*, No. GV4-02057, Petition (Travis Co. Dist. Ct., Filed Feb. 5, 2007) (seeking to enjoin Petitioner Sprint Nextel's affiliate from characterizing as a state utility tax a line item charge imposed over a year before the tax's effective date); *see also Texas v. Sprint Spectrum*, Case 1:07-cv-00150-SS (W. D. Tex. April 11, 2007) (finding no preemption and remanding to state court).

misleading bill inserts. *See, e.g., Consolidated Edison v. New York Public Serv. Comm'n*, 447 U.S. 530 (1980). Aside from bill inserts, carriers retain many other avenues for communicating with the public regarding State and local taxes and fees. *See, e.g., Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

Third, Petitioners' claim that States are imposing hidden taxes on wireless consumers with increasing frequency is not supported by the record. The FCC cited no such "increasing" effort by State and local governments as the basis for its Declaratory Ruling, noting only three State laws prohibiting carriers from passing certain regulatory fees or taxes through to consumers as line item charges. Pet. App. 68a n. 87.[11] Those laws were of long-standing and were not targeted at wireless carriers, being imposed either on utilities generally or on telecommunications carriers. For example, Indiana's law prohibiting utilities' pass-through of the State's gross utility tax, though enacted in 2002, merely increased the tax previously in effect by 0.2%. *See* Pet. App. 159-60a.[12] Until the FCC's ruling, State and local governments had the power to prohibit or mandate line items on, wireless carriers' bills.[13] This authority extended to taxes, other regulatory

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[11] The FCC also preempted a Colorado statute requiring carriers to pass through contributions to the State's universal service fund. Pet. App. 68a n. 88. Despite their avowed desire to protect consumers from hidden taxes or fees, Petitioners inexplicably support preemption of the Colorado law even though it did "not present the serious practical problems caused by *prohibitions* on the use of line items." Pet. 6 n.3 (emphasis original).

[12] The other state laws cited by the FCC were likewise long-standing. For example, Vermont's rule had been in effect since 1991. *See Petition of Dept. of Public Service for a Declaratory Ruling Concerning the Applicability of 30 V.S.A. § 22*, Docket No. 5464, 1991 WL 736274 (Vt. P.S.B. March 8, 1991). The Georgia law prohibiting telecommunications carriers (wireless and wireline) from passing contributions to the State's universal service fund through as line item charges was adopted in 1995. *See* Ga. Code Ann. § 46-5-167(h).

[13] A fact noted by the dissents to the FCC order. *See* Pet. App. 135-36a ("It will take some time for states to survey the debris from this erosion of

assessments, and indeed, any billing practice that was deceptive, misleading or unreasonable. Nothing in the record or Petitioners' argument suggests that States have misused this power or that they are likely to misuse it in the future.

2. Petitioners Mischaracterize The 1993 Amendments To Section 332(c)(3).

Petitioners also exaggerate the impact of the Eleventh Circuit's ruling on the wireless regulatory scheme by mischaracterizing Congress' purposes in enacting the 1993 amendments to the Act. For example, Petitioners assert that the court's decision "threatens to limit the FCC's ability to implement the deregulatory scheme Congress adopted." Pet. 20. Likewise, Petitioners assert that, in amending Section 332(c)(3), "Congress eliminated the traditional limitation on federal authority over intrastate communications services insofar as they relate to the provisions of wireless service." *Id.* at 18.[14] Both assertions are wrong.

As previously noted, *supra* pp. 4-6, a primary purpose of the 1993 amendments to the Act was not to introduce a deregulatory scheme governing wireless service but rather to eliminate the disparate treatment of providers of "private" and "public" mobile services that often were indistinguishable from one another and instead, to regulate those carriers in a consistent manner. A second, but by no means secondary, purpose of the 1993 amendments was to ensure that consumers would not be denied protection if new wireless services were classified as "private" under the former regulatory scheme. The 1993 amendments served both purposes by bringing formerly "private," unregulated wireless

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cooperative federalism."); *id.* at 139a ("By preempting states, our historic partners in consumer protection, this Order curtails States' ability to moderate line items on consumers' wireless phone bills.").

[14] As authority for this proposition, Petitioners cite no less an objective source than a law journal article authored by Sprint Nextel's general counsel.

services within the federal-state regulatory scheme established in the Act, and by ensuring that States retained their ability to protect consumers pursuant to their jurisdiction over "other terms and conditions" of wireless service. Moreover, though States were preempted from regulating commercial wireless "entry," Congress expressly provided for the resumption of "rate" regulation of such service if certain market conditions existed or if consumers were harmed thereby. State regulation of wireless billing practices, including line items on customers' bills under their "other terms and conditions" authority does not threaten this regulatory scheme.

Likewise, Petitioners err when they assert that the 1993 amendments "eliminated the traditional limitation on federal authority over intrastate communications services insofar as they relate to the provisions of wireless service," and that "section 332(c)(3)(A) did not *preserve* anything." Pet. 18, 20-21 (emphasis original). When Congress amended Section 332(c)(3)(A) of the Act to preempt States from regulating the "entry of" or "rates charged by" commercial wireless service, it made clear that such preemption applied "notwithstanding sections 152(b) and 221(b)" of the Act. *See* 47 U.S.C. § 332(c)(3)(A). This language did not eliminate State jurisdiction over intrastate wireless service, it simply recognized that, but for the preemption clause in Section 332(c)(3)(A), States otherwise would have retained jurisdiction over commercial wireless rates and entry. Nor can the language of section 332(c)(3)(A) be read to give the FCC power over intrastate "terms and conditions" of wireless service, something expressly denied it under section 152(b) of the Act. *See Louisiana PSC*, 476 U.S. at 374; *AT&T v. Iowa Util. Bd.*, 525 U.S. 366, 381 n.7 & 8 (1999).

Finally, if the consequences of the Eleventh Circuit's decision were as dire as Petitioners suggest, then the FCC presumably would have sought review of the vacated Declaratory Ruling itself. The fact that the Solicitor General did not file a petition for certiorari on the FCC's behalf, did

not file a respondent's brief in support of Petitioners' effort to obtain review, and affirmatively waived the United States' right to file a respondent's brief, speaks volumes to the purportedly sweeping import of the Eleventh Circuit's decision.

3. Review Is Not Necessary At This Time.

In any event, the notion that the Court must review the Eleventh Circuit's decision in order to uphold Congress' "deregulatory" objectives is wrong. *See* Pet. 20. As Respondents previously noted, the FCC initiated a further rulemaking in conjunction with its Declaratory Ruling in which it tentatively concluded that it may preempt all State laws regulating carrier billing practices – wireless or wireline – on the grounds such laws conflict with the FCC's scheme for truth-in-billing regulation. Pet. App. 88-91a. That rulemaking is pending. If the FCC adopts its tentative conclusion its decision undoubtedly will be appealed, first to the Circuit Courts and eventually to this Court. The Court should allow the administrative process, and any Circuit Court appeals, to run their course before taking up the question of whether preemption of the State laws should be implied because they allegedly stand as obstacles to the full achievement of Congress' purposes.

C. THE ELEVENTH CIRCUIT'S ANALYSIS UNDER *CHEVRON* WAS CORRECT IN ANY EVENT.

In any event, the Eleventh Circuit's decision was correct on the merits and does not warrant review by the Court.

The appeals court first set forth the proper analytical framework for its review of Section 332(c)(3)(A) and the FCC's Declaratory Ruling under *Chevron* Step One. Pet. App. 12a. Step One of *Chevron*, the court noted, required it to determine whether Congress had "directly spoken to the precise question at issue." Pet. App. 23a (internal citation

omitted). To do this, the appellate court noted, courts "employ[] traditional tools of statutory construction" (*e.g.*, assigning statutory terms their ordinary meaning and reviewing relevant legislative history) and that, while some deference is given to agencies' interpretation of their statutes, "courts are the final authorities on issues of statutory construction." *Id.* at 24a (internal citations omitted). Finally, the Eleventh Circuit noted, "it must consider the "context in which the term is used" in order to determine whether a statutory term is clear and unambiguous." Pet. App. 24a (internal citation omitted).

The Eleventh Circuit also set out the proper framework for analyzing whether Section 332(c)(3)(A) of the Act expressly preempted the State laws in question. Pet. App. 21a. The court correctly noted that, in the case of preemption, "'the purpose of Congress is the ultimate touchstone' of pre-emption analysis" and "any understanding of the scope of a pre-emption statute must rest primarily on a fair understanding of congressional purpose." *Id.* at 22a (internal citations omitted). The Eleventh Circuit started "with the assumption that the historic police powers of the states are not superseded by federal law unless preemption is the clear and manifest purpose of Congress." Pet. App. 22a (internal citation omitted). Such laws, the court correctly noted, should not be deemed preempted absent a clear, unmistakable statement of Congress' preemptive intent or that the nature of the regulated subject matter permits no other conclusion. Pet. App. 22-23a. Applying these precedents, the Eleventh Circuit correctly observed that "[a]lthough the presumption against preemption cannot trump our review of the [Declaratory Ruling] under *Chevron*, this presumption guides our understanding of the statutory language that preserves the power of the States to regulate 'other terms and conditions.'" Pet. App. 23a.

Having set out the proper analytical framework for its review of Section 332(c)(3)(A), the Eleventh Circuit turned to the FCC's Declaratory Ruling. Although it recognized that

"rates charged" was not defined in the Act, the court concluded that "the meaning of this term is clear in this context" and that "a straightforward reading of the complementary phrases 'regulate entry of or rates charged' and 'other terms and conditions' . . . evidences the 'clear and manifest purpose of Congress' to leave the regulation of line items to the states. . . ." *Id.* The court first considered the "ordinary, contemporary, common meaning" of "rates" by reference to several dictionaries, and concluded that a "rate" is generally understood to be a "charge or payment" for a particular good or service. Pet. App. 25-26a. This understanding was consistent, the court noted, with prior FCC statements distinguishing "rates" from "line items." *Id.* at 27a. Likewise, the Eleventh Circuit dismissed the notion advanced by the FCC that, based on agency statements in other contexts, line items were "rate levels" or "rate structures," or "rate elements," noting that such specific components of "rates" did not "magically expand the authority of the [FCC] beyond what the statutory language allows." *Id.* at 28 & 30a. The Eleventh Circuit also concluded that the FCC misconstrued the legislative history of Section 332(c)(3)(A), which made it clear that Congress meant "other terms and conditions of" wireless service regulated by States to be broadly construed. Pet. App. 31a. Finally, while the court agreed that "the substance, not merely the form" of a State's regulation governs whether it is rate regulation, it concluded that the FCC "does not articulate the 'substance' that distinguishes whether a regulation of line items is a billing practice or rate regulation." *Id.* at 31-32a.

Ultimately, the Eleventh Circuit correctly concluded that "[t]he interpretation of 'rates' urged by the [FCC] deprives the complementary phrase 'other terms and conditions' of all meaning," in violation of the "cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." Pet. App. 32a, *quoting TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Under the FCC's interpretation, the

court noted, "even powers historically retained by the states, such as the imposition of state taxes, would be preempted so long as they impact 'how carriers recover [the] costs of doing business." The FCC's failure to delineate the proper scope of rate regulation, the appellate court noted, allowed the FCC "indefinitely to expand its authority without regard to the mandate by Congress that 'other terms and conditions' remain the realm of state regulation." *Id.*

II. THE ELEVENTH CIRCUIT'S REFERENCE TO THE PRESUMPTION AGAINST PREEMPTION DOES NOT WARRANT REVIEW.

Rather than presenting any direct conflict involving the Eleventh Circuit's ruling that section 332(c)(3)(A) does not preempt state laws requiring or prohibiting wireless line items, Petitioners seek to manufacture one by asserting – at the very end of their brief – that the Eleventh Circuit's reference to the presumption against preemption conflicts with either the Sixth Circuit's judgment in *Wachovia Bank, N.A. v. Watters*, 431 F.3d 556 (6th Cir. 2005) or this Court's decision in *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735 (1996). Pet. 22-23. The Eleventh Circuit's reference to the presumption against preemption conflicts with neither decision.

As a threshold matter, the issue is entirely academic. Although the Eleventh Circuit applied a presumption against preemption in its analysis of Section 332(c)(3)(A), there is no reason to believe the court's holding would have been different had it not applied the presumption. To the contrary, the court of appeals concluded that "[a] straightforward reading" of the statutory provision at issue "evidences the 'clear and manifest purpose of Congress' to leave the regulation of line items to the states." Pet. App. 25a (internal citation omitted). Once the court turned from general principles to Section 332(c)(3)(A) itself, it looked principally at "common definition[s]" and the "express language" of the statutory terms. Pet. App. 32a. A grant of certiorari to review

the Eleventh Circuit's use of the presumption against preemption would produce nothing more than an advisory opinion.

Nor is there any reason, as Petitioners tentatively suggest, to grant certiorari, vacate the Eleventh Circuit's judgment, and remand for further consideration given this Court's recent ruling in *Watters v. Wachovia Bank, N.A.*, No. 05-1342 (April 17, 2007). The Court in *Watters* did not reach the question whether agency regulations purporting to preempt state law should receive *Chevron* deference. "This argument is beside the point," the Court stated, "for under our interpretation of the statute, the level of deference owed to the regulation is an academic question." *Watters*, slip op. at 16. Nothing in the Court's opinion in *Watters* contradicts the Eleventh Circuit's opinion here.

A. THERE IS NO SPLIT IN THE CIRCUITS REGARDING THE PRESUMPTION AGAINST PREEMPTION.

The Eleventh Circuit's reference to the presumption against preemption as a guide for its analysis of section 332(c)(3)(A) does not conflict with the Sixth Circuit's decision in *Watters* in any way.[15] The two courts dealt with two very different types of preemption. Contrary to Petitioners' suggestion, the Sixth Circuit did not reject the presumption against preemption as always inapplicable to agency actions. Rather, the court noted that the State "correctly asserted that there is a presumption against preemption in areas of regulation typically left to the states" but concluded the presumption did not apply to "'conflict preemption' . . . where 'state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Watters*, 431 F.3d 556, 560 & n.3,

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[15] In light of the Court's recent ruling in *Watters*, affirming the Sixth Circuit's decision on other grounds, Petitioners' claim that the Sixth Circuit's decision conflicts with the Eleventh Circuit's ruling may well have been rendered moot.

citing Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153-54 (1982).

In contrast, the FCC's ruling was based entirely on the notion that Congress expressly preempted state laws requiring or prohibiting wireless carriers' use of line item charges when it amended section 332(c)(3)(A) of the Act to prohibit state regulation of "rates charged by" wireless carriers." *See* Pet. App. 65-66a, 70-72a. To remove any doubts, the FCC distinguished the express preemption it found from any implied preemption that it believed – but did not conclude – might also apply:

> Even setting aside the preemptive effect of section 332(c)(3), we note that the type of state regulations described above also may be subject to preemption because they conflict with established federal policies. It is recognized widely that federal law preempts state law where, as here, the state law would "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," or of federal regulations.

Pet. App. 74a. And in contrast to *Watters,* the FCC's Declaratory Ruling was not based on any assertion of *de la Cuesta* authority but instead was based solely on the agency's interpretation of the preemptive scope of Section 332(c)(3)(A) of the Act. Pet. App. 65-68a.[16] Indeed, the FCC only referred to *de la Cuesta* in the portion of its order "noting" that preemption of state laws requiring or prohibiting line items "might" also be implied. *Id.* at 74a n.100.

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[16] In its brief below, the FCC rejected any suggestion that its Declaratory Ruling was based on implied preemption. Brief for FCC at 45-47. The wireless intervenors likewise rejected this suggestion. Brief for Wireless Intervenors at 37-38.

The subject matter of the regulation is yet another relevant distinction between the Sixth Circuit decision in *Watters* and the Eleventh Circuit's decision. The Sixth Circuit noted that the presumption against preemption "disappears . . . in fields of regulation that have been substantially occupied by federal authority for an extended period of time," such as regulation of federally chartered banks. *Watters*, 431 F.3d at 559 n.2 (internal quotations and citations omitted). Whether or not that conclusion is correct, it does not conflict with the Eleventh Circuit's application of the presumption to the entirely different field of utility billing practices, an area of traditional State regulation expressly preserved by Congress in the Act. *See Arkansas Electric Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983).

B. THE ELEVENTH CIRCUIT'S REFERENCE TO THE PRESUMPTION AGAINST PREEMPTION DOES NOT CONFLICT WITH THIS COURT'S RULINGS.

There is no conflict between the Eleventh Circuit's decision that its review of the Declaratory Ruling under *Chevron* should be "guided" but not "trumped" by the presumption against preemption, and this Court's ruling in *Smiley*. Pet. App. 23a. The Eleventh Circuit's observation that the presumption does not "trump" its analysis under *Chevron* clearly does not conflict with the Court's opinion in *Smiley*. *See Smiley*, 517 U.S. 743-44 (rejecting argument that the presumption against preemption "in effect trumps *Chevron*"). Nor is the Eleventh Circuit's observation that its analysis under *Chevron* Step One is guided by the presumption against preemption in conflict with the Court's ruling in *Smiley* because the Court did not address that question.

The Court in *Smiley* did not repudiate the presumption against preemption that courts utilize in determining a statute's preemptive effect and scope under *Chevron* Step One, but rather found the presumption inapplicable to the case

before it. In *Smiley*, the Office of the Comptroller of the Currency ("OCC") adopted a regulation defining "interest" to include late-payment charges.[17] Though the regulation merely defined a substantive term in the National Bank Act, the statutory provision it implemented (*i.e.*, 12 U.S.C. § 85) clearly was preemptive. *Smiley*, 517 U.S. at 737. The Court rejected the petitioner's claim that the "presumption against preemption" *required* the Court to undertake its own interpretation of the statute in determining whether the OCC exceeded its statutory authority in promulgating the regulation, noting:

> This argument confuses the question of the substantive (as opposed to pre-emptive) *meaning* of a statute with the question of *whether* a statute is preemptive. We may assume (without deciding) that the latter question must always be decided *de novo* by the courts. That is not the question at issue here; there is no doubt that § 85 preempts state law. . . . What *is* at issue here is simply the meaning of a provision that does not (like the provision in *Cipollone*) deal with preemption, and hence does not bring into play the considerations petitioner raises.

Id. at 743-44 (emphasis original).

In contrast, the FCC's Declaratory Ruling clearly represented the agency's determination of the preemptive

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[17] The agency action under review likewise distinguishes *Smiley* from the case below. The Court in *Smiley* noted that "we have before us here a full-dress regulation, issued by the [OCC] and adopted pursuant to the notice-and-comment procedures of the Administrative Procedure Act designed to assure due deliberation." *Smiley*, 517 U.S. at 741. The same cannot be said of the FCC's preemption ruling, which was adopted without any prior notice. *See* Pet. App. 139a; *see also* 69 Fed. Reg. 33021 (June 14, 2004); *see also In re Truth-in-Billing & Billing Format*, Public Notice, 19 F.C.C.R. 9541 (2004).

meaning of Section 332(c)(3)(A). The FCC's ruling cannot be equated with a regulation defining a substantive term of the Act, which then happened to be preempted by section 332(c)(3)(A). In short, the FCC was addressing the latter question noted in *Smiley*, *i.e.*, whether the relevant statute is preemptive. The Eleventh Circuit's reference to the presumption against preemption as a "guide" in its analysis of Section 332(c)(3)(A) was entirely consistent with *Smiley*.[18]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 7, 2007

**** Counsel of Record***

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[18] In this Court's recent decision in *Watters*, the three dissenting Justices addressed the relationship between *Chevron* and the presumption against preemption and agreed with the Eleventh Circuit's approach. *Watters*, slip op. at 20-21 (Stevens, J., dissenting) ("when an agency purports to decide the scope of federal preemption, a healthy respect for state sovereignty calls for something less than *Chevron* deference"). As noted, the majority in *Watters* did not address the issue.

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Dec. 14, 2006]

No. 05-11682-DD

NATIONAL ASSOCIATION OF STATE
UTILITY CONSUMER ADVOCATES,
Petitioner,

NATIONAL ASSOCIATION OF REGULATORY
UTILITY COMMISSIONERS,
Intervenor-Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION,
Respondent,

AT&T CORPORATION, CINGULAR WIRELESS, INC., LEAP WIRELESS INTERNATIONAL, INC., NEXTEL COMMUNICATIONS, INC., SPRINT CORPORATION, T-MOBILE USA, INC., VERIZON, CELLULAR TELECOMMUNICATIONS and INTERNET ASSOCIATION,
Intervenors-Respondents.

No. 05-12601-DD

VERMONT PUBLIC SERVICE BOARD,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

Petition for Review of Decisions of the
Federal Communications Commission

ORDER:

(X) The motion of Intervenors, Sprint Nextel Corporation. and T-Mobile, USA, Inc., for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of Intervenors, Sprint Nextel Corporation and T-Mobile, USA, Inc. , for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including March 7, 2007, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

[Illegible]
UNITED STATES CIRCUIT JUDGE

APPENDIX B

TITLE 47—TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS

CHAPTER 5—WIRE OR RADIO COMMUNICATION GENERAL PROVISIONS

§ 151. Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

APPENDIX C

TITLE 47—TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS

CHAPTER 5—WIRE OR RADIO COMMUNICATION GENERAL PROVISIONS

§ 152. Application of chapter

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone. The provisions of this chapter shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in subchapter V-A.

(b) Except as provided in sections 223 through 227 of this title, inclusive, and section 332 of this title, and subject to the provisions of section 301 of this title and subchapter V-A of this chapter, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication

solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 to 205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4) of this subsection.